Supreme Court, U.S.
FILED

(1)

021847 JUN 17 2003

No. 02-___

In The
Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES, CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

William D. Outman, II
(Counsel of Record)
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4078
(202) 452-7010
Counsel for Petitioner
International Business Machines,
Corp.

June 17, 2003

66 pp

QUESTIONS PRESENTED

1. If Congress has specifically provided for interest on refunds of taxes, and Congress has also specifically provided for interest on refunds of duties, should interest also be available for refunds of the HMT, which this Court has held to be an unconstitutional "tax or duty" on exports?

2. Does the failure of the government to pay interest on refunds of the unconstitutional Harbor Maintenance Tax ("HMT") violate the Takings Clause of the Constitution?

3. Is the government required by the Export Clause of the Constitution to pay interest on refunds of the HMT the assessment of which this Court previously held violated that constitutional provision?

4. Does the equitable doctrine of restitution require the government to pay interest on refunds of the unconstitutional HMT?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

RULE 29.6 STATEMENT

Petitioner International Business Machines Corp. has no parent companies, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF *CERTIORARI* 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 5
I. The Court Should Grant the Writ Because of the Importance of This Case 5
II. The Court Should Grant the Writ Because of Serious Flaws in the Reasoning of the Federal Circuit 6
A. If Congress specifically and explicitly provided for interest on refunds of both duties and taxes, then interest must be available for refunds of the HMT, which this Court has held to be unconstitutional as a duty or tax on exports 7

TABLE OF CONTENTS (Continued)

Pages

B. Interest on Refunds of Unconstitutional HMT is Available Under the Takings Clause 11
C. Interest on Refunds of the Unconstitutional HMT is Available Under the Export Clause 13
D. Interest on Refunds of the Unconstitutional HMT is Available Under the Equitable Doctrine of Restitution 14
CONCLUSION 18

TABLE OF AUTHORITIES

CASELAW **Pages**

Brown v. Legal Foundation of Washington, 123 S.Ct. 1406 (2003).....12, 13
Brushaber v. Union P.R. Co., 240 U.S. 1 (1916).....12, 13
Fairbank v. United States, 181 U.S. 283 (1901) 13
Henkels v. Sutherland, 271 U.S. 298 (1926).....13
Ikelionwu v. United States, 150 F.3d 233 (2d Cir. 1998) 16
International Business Machines, Corp. v. U.S., 531 U.S. 1183 (2001) 4
International Business Machines, Corp. v. U.S., 2002 Ct. Intl. Trade LEXIS 16 (Ct. Int'l Trade Feb. 21, 2002).....1
International Business Machines, Corp. v. U.S.,2003 U.S. App. LEXIS 5396 (Fed. Cir. March 19, 2003).....1
Larson v. United States, 274 F.3d 643 (1st Cir. 2001).....16
Library of Congress v. Shaw, 478 U.S. 310 (1986) 6, 8, 11
Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 12
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998).....11

CASELAW (Continued) **Pages**

Quarty v. United States, 170 F.3d 961 (9th Cir. 1999) 12
United States v. $7,990.00, 170 F.3d 843 (8th Cir. 1999) 16
United States v. $30,006.25, 236 F.3d 610 (10th Cir. 2000) 16, 17
United States v. $277,000, 69 F.3d 1491 (9th Cir. 1995) 16
United States v. $515;060.42, 152 F.3d 491 (6th Cir. 1998) 15
United States v. $133,735.30, 139 F.3d 729 (9th Cir. 1998) 16
United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) 2
United States Shoe Corp. v. United States, 20 C.I.T. 206 (1996) 2, 3
United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997) 2
United States Shoe Corp. v. United States, 523 U.S. 360 (1998) 3, 5
United States Shoe Corp. v. United States, 296 F.3rd 1378 (Fed. Cir. 2002) 4
United States Shoe Corp. v. United States, 71 U.S.L.W. 3734 (May 27, 2003) 4, 5

CASELAW (Continued) **Pages**

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)..... 11

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. CONST., art. I, sec., 9, cl. 5..... 2, 5
U.S. CONST., amend. 5..... 4
19 U.S.C. § 1505 ..... 3, 7, 8, 10
26 U.S.C. § 4461 2
26 U.S.C. § 4462 ..... 2, 3, 5, 8
26 U.S.C. § 6621 5
26 U.S.C. § 9505 2
26 U.S.C. § 9602(b)..... 2
28 U.S.C. § 1254(1)..... 1
28 U.S.C. § 1295(a)(5)..... 5
28 U.S.C. § 1581 .....5, 10
28 U.S.C. § 2411 .....*passim*
28 U.S.C. § 2465(b)(1)(C)..... 17

MISCELLANEOUS

Dobb's Law of Remedies (1993)..... 14
Restitution and Implied Contracts, 66 Am. Jur. 2d § 1 (1973) 15

MISCELLANEOUS (Continued) **Pages**

RESTATEMENT OF RESTITUTION
§ 156, 157 (1937) 15

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner International Business Machines, Corp. respectfully petitions for a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in this case.

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-8a) is available at 2003 U.S. App. LEXIS 5396 (Fed. Cir. March 19, 2003). The opinion of the U.S. Court of International Trade (Pet. App. 9a-12a) is available at 2002 Ct. Intl. Trade LEXIS 16 (Ct. Int'l Trade Feb. 21, 2002).

JURISDICTION

The Federal Circuit issued its decision on March 19, 2003. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix (at 36a-38a).

STATEMENT OF THE CASE

The issue in this case is whether the government must pay interest or disgorge its profits on the money it exacted unconstitutionally from exporters via the Harbor Maintenance Tax ("HMT"). International Business Machines, Corp. ("IBM") asks this Court to grant its petition for *certiorari*.

1. The HMT required importers, exporters, and domestic shippers to pay the government a percentage of the value of all cargo they moved through any port. 26 U.S.C. §§ 4461-4462. IBM and many thousands of other companies paid the tax, and the government kept the collected monies in the Harbor Maintenance Trust Fund, where those monies earned interest. 26 U.S.C. §§ 9505, 9602(b).

IBM paid the HMT on the goods it exported. IBM, and thousands of other exporters filed suit to recover those funds, claiming that the tax violated the Export Clause, the constitutional provision that states: "No Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. A special three-judge panel of the Court of International Trade ("CIT") ruled the HMT unconstitutional as a tax or duty on exports. *United States Shoe Corp.* v. *United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). After the government filed a notice of appeal, the CIT issued a judgment ordering the government to pay interest on refunds of the HMT, which was codified as a "tax" in the Internal Revenue Code. *United States Shoe Corp.* v. *United States*, 20 C.I.T. 206, 208-09 (1996). The court ruled that Congress had waived immunity from interest by enacting 28 U.S.C. § 2411, which provides: "[i]n any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed."

On appeal, a special five-judge panel of the Federal Circuit affirmed the ruling of the CIT that the HMT was a "tax or duty" on exports and thus violated the Export Clause. *United States Shoe Corp.* v. *United States*, 114 F.3d 1564, 1577 (1997). The Federal Circuit did not address the question of interest because the government's notice of appeal had pre-

dated the CIT's decision awarding interest. *United States Shoe*, 20 C.I.T. at 207. This Court granted *certiorari* and affirmed unanimously the decision of the Federal Circuit. *United States Shoe Corp. v. United States*, 523 U.S. 360, 370 (1998).

2. After this Court had struck down the HMT as an unconstitutional "tax or duty" on exports, IBM's action was designated by the Court of International Trade as a "test case" on the issue of interest on the refunds of the HMT. On June 17, 1998, the CIT ordered the government to pay interest to IBM. Pet. App. 34-35a. The decision adopted the earlier ruling of the CIT (*United States Shoe*, 20 C.I.T. at 209) that interest was owed pursuant to 28 U.S.C. § 2411.

The government appealed the ruling of the CIT in *IBM*, and the Federal Circuit reversed the CIT. Pet. App. 17a-33a. The court deemed section 2411 inapplicable to the HMT due to a provision of the HMT stating: "The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. § 4462(f)(3)). Pet. App. 22a-23a. The Federal Circuit also rejected IBM's argument that interest was owed because: (a) "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] . . . as if such tax were a customs duty" (26 U.S.C. § 4462(f)(1)); and (b) the administrative provisions of the customs laws provide that "[t]he Customs Service shall . . . refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation" (19 U.S.C. § 1505(b)). Pet. App. 36a. The court ruled that section 1505 "contemplates an entirely different factual scenario from the one before us" be-

cause it contains words such as "liquidation" that apply only to import duties. *Id.* at 32a.

IBM filed a petition for writ of *certiorari*, contending, *inter alia*, that the government's retention of interest violated the Takings Clause of the Fifth Amendment of the U.S. Constitution, which provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST., amend 5. This constitutional contention was presented to this Court for its consideration as an alternative reason to grant review, even though it had not been fully aired before the Federal Circuit. The United States opposed the petition, in part, on the ground that the constitutional contention had not been raised below, U.S. BIO, No. 00-482 at 5, and the petition was denied. 531 U.S. 1183 (2001).

3. After this Court denied IBM's petition, IBM returned to the CIT in order to raise its Fifth Amendment Takings Clause argument for interest in the normal course, as well as to present arguments for interest under the Export Clause and the equitable doctrine of restitution. The CIT, however, declined to consider those arguments on the merits because it believed that only the Federal Circuit could address them at that point, given the procedural posture of the action. Pet. App. 9a. IBM then appealed to the Federal Circuit, which declined to address the procedural issue and instead affirmed on the substantive ground that its decision in *United States Shoe Corp. v. United States*, 296 F.3rd 1378 (2002), had already rejected the availability of interest on the basis of the arguments presented by IBM. Pet. App. 8a.

4. On May 27, 2003, this Court denied United States Shoe Corporation's petition for a writ of *certio-*

rari from the Federal Circuit's decision on the basis of which that circuit also denied IBM relief here. 71 U.S.L.W. 3734 (May 27, 2003). With respect, IBM believes this Court's recent denial of *certiorari* was ill-considered. For the important reasons which follow, IBM urges the Court to grant review here and determine for itself, on the merits, whether interest is available for the unconstitutional exaction that this Court declared to have occurred in its 1998 *United States Shoe* decision concerning the HMT.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant the Writ Because of the Importance of This Case.

This case warrants *certiorari* due to its importance. The government collected nearly $1.5 billion in export taxes notwithstanding the constitutional decree that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The government then held that money for more than a decade, depriving the exporters of an estimated $700 million in lost time-value of the money (as calculated by the statutory interest rate for refunds of taxes and customs duties, *see* 26 U.S.C. § 6621) and earning an estimated $70 million in actual proceeds from its ill-gotten money. The claims of approximately 7500 companies for interest will be determined by the outcome of this action. Because lawsuits arising from the HMT are within the exclusive jurisdiction of the Court of International Trade (*see* 26 U.S.C. § 4462(f)(2); 28 U.S.C. § 1581; *United States Shoe*, 523 U.S. at 366), the decisions of which are appealable only to the Federal Circuit (*see* 28 U.S.C. § 1295(a)(5)), a circuit conflict can never arise regarding the statutory basis for interest.

The government itself petitioned successfully for *certiorari* in *United States Shoe* by emphasizing the case's importance. Furthermore, the government has repeatedly sought *certiorari* successfully in cases that involve large sums of money and that arise from subject matter within the exclusive jurisdiction of the Federal Circuit.

II. The Court Should Grant the Writ Because of Serious Flaws in the Reasoning of the Federal Circuit.

Certiorari is also warranted due to the flaws in the reasoning of the Federal Circuit in both IBM's case and that of the United States Shoe Corporation. In these cases, the Federal Circuit relied on the Supreme Court's holding in *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), that, unless Congress expressly waives the government's sovereign immunity, or the Constitution otherwise provides, the government is not required to pay interest.

In this case, if the lower courts are correct that Congress, although it expressly waived the government's sovereign immunity from interest payments for both tax and duty refunds, did not do so with respect to refunds of the HMT, *Shaw* instructs that the government's obligation to pay interest on the HMT must be found in the Constitution. Even though this Court has never reviewed the merits of whether a statute provides the express waiver of immunity required under *Shaw,* interest on refunds of the unconstitutional HMT is available under the principle enunciated in *Shaw* pursuant to the Constitution itself. Specifically, interest on refunds of the unconstitutional HMT is available under the Takings Clause, or, alternatively, the Export Clause. In any event,

such interest is available under the equitable doctrine of restitution.

A. If Congress specifically and explicitly provided for interest on refunds of both duties and taxes, then interest must be available for refunds of the HMT, which this Court has held to be unconstitutional as a duty or tax on exports.

Congress waived immunity from interest on both customs duties — "[t]he Customs Service shall . . . refund any excess moneys deposited, together with interest thereon" (19 U.S.C. § 1505) — and taxes — "[i]n any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed" (28 U.S.C. § 2411). This Court has held, in *United States Shoe*, that the HMT is unconstitutional because it is a "tax or duty" on exports, and thus violates the Export Clause.

In IBM's initial appeal, the Federal Circuit held that, although Congress provided specifically, in 19 U.S.C. § 1505, for interest on refunds of duties, and specifically, in 28 U.S.C. § 2411, for interest on refunds of taxes, the government has no obligation whatsoever to pay interest on the HMT, which this Court held to be an unconstitutional "tax or duty" on exports. Such a result flies in the face of the intention of the framers of the Constitution that no burden should be placed on exports. In its decision on IBM's original appeal, however, the Federal Circuit merely addressed whether Congress, by statute, had waived the immunity of the government from the obligation to pay interest. The Federal Circuit did not address

the other basis discussed in *Shaw* for overcoming the government's immunity, that is, the Constitution.

After this Court denied IBM's first petition for writ of *certiorari*, and declined to address the Federal Circuit's decision to deny interest based on the lack of an explicit statutory waiver of immunity, IBM returned to the CIT. There, IBM argued that interest on refunds of the HMT should be available under the Takings Clause, the Export Clause, and the equitable doctrine of restitution. After the CIT refused to address those arguments, for procedural reasons, IBM appealed the CIT's decision to the Federal Circuit. The resulting decision of the Federal Circuit is the subject of the instant petition, which asks this Court to correct the absurd result of the lower courts' reasoning that one will receive interest on refunds of duties or taxes in the usual course, but not on a refund of an unconstitutional tax or duty.

First, the Federal Circuit held that interest is not available under the tax interest statute, 28 U.S.C. § 2411, because, in the HMT statute, at 26 U.S.C. § 4462(f)(3), Congress instructed that the HMT was not to be "treated as a tax for purposes of . . . any . . . provision of law relating to the administration and enforcement of internal revenue taxes." Then, the Federal Circuit held that interest is not available under the duty interest statute, 19 U.S.C. § 1505, even though the HMT statute, at 26 U.S.C. § 4462(f)(1), provides that "all administrative and enforcement provisions of customs laws and regulations shall apply [to the HMT] as if such tax were a customs duty." The quoted statutes clearly do not exhibit an intention of Congress to deprive taxpayers of interest on their refunds of the unconstitutional HMT. What these statutes do is establish Congress' intent that,

for purposes of "administration and enforcement," the HMT, although it is a tax codified in the Internal Revenue Code, be treated "as if" it were a customs duty.

The Internal Revenue Service administers and enforces internal revenue taxes, and the Bureau of Customs and Border Protection (formerly the U.S. Customs Service) ("Customs") administers and enforces customs duties. In enacting the provisions of the HMT statute quoted above, Congress was merely clarifying which of these two administrative agencies would administer and enforce the HMT. The choice of Customs seems appropriate in view of the fact that the HMT was assessed on goods imported into, and exported from, the United States, activities within the usual domain of Customs' administration and enforcement responsibilities.

Contrary to the Federal Circuit's holding, the provisions of the HMT statute quoted above have absolutely no effect on the judicial award of interest under 28 U.S.C. § 2411. In no way is a court's award of interest under a statute enacted in the Judicial Code (Title 28, not Title 26 (Internal Revenue Code)) affected by Congress' designation of the HMT as a "customs duty" for purposes of "administration and enforcement." The courts are not administering or enforcing the HMT when they award interest to a taxpayer on its refund of an unconstitutionally exacted tax. The court is ordering the administrative agency to pay interest, in accordance with the Judicial Code, on a tax refund.

Furthermore, the Federal Circuit also misinterpreted the provisions of the HMT statute quoted above when the court held that customs duty interest

is not available because 19 U.S.C. § 1505 uses language, such as the word "liquidation," that only applies to imports. It is certainly not a great surprise that the language of the statute providing for interest on refunds of customs duties uses language that applies to imports, and not exports, because the framers of the Constitution, in the Export Clause, flatly prohibited customs duties on exports. Recognizing this fact, this Court, in *United States Shoe*, specifically read the language of the jurisdictional provision, 28 U.S.C. § 1581(i), that refers only to imports, and not to exports, to apply to the HMT on exports. In reaching its erroneous conclusion regarding the inapplicability of the customs duty interest provision, the Federal Circuit completely ignored this holding of this Court in *United States Shoe*. For this reason alone, this Court should grant this petition for writ of *certiorari*.

The provisions of the HMT statute quoted above should be interpreted in a light favorable to IBM, because to interpret them otherwise raises serious constitutional questions about the legitimacy of the government's actions with respect to HMT interest. If this Court accepts the lower court's interpretation of the statutes, the Court should correct the illogical and unjust result of that interpretation by granting this petition and providing IBM interest under the Takings Clause or the Export Clause of the Constitution, or, in any event, under the equitable doctrine of restitution.

B. Interest on Refunds of Unconstitutional HMT is Available Under the Takings Clause.

This Court, in *Shaw*, specifically recognized the Takings Clause of the Fifth Amendment as creating an exception to the government's immunity from having to pay interest. *See Shaw*, 478 U.S. at 317, n. 5. Furthermore, the Takings Clause requires the government to pay, as part of the "just compensation," required by the Fifth Amendment, interest based on the lost time-value of the money.

First, the retention of interest earned by the government on unconstitutional HMT taxes qualifies as a *per se* taking because the government held the monies in the Harbor Maintenance Trust Fund for its own use. The Court has held that the retention of interest is a *per se* taking in other cases with takings similar to that at issue in this case. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

Second, IBM is entitled to the lost time-value of its unconstitutionally exacted HMT because the very exaction of the tax was confiscatory and thereby effected a taking under *Brushaber v. Union P.R. Co.*, 240 U.S. 1 (1916) and its progeny. *Brushaber* discussed the possibility of a situation

> where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking

> of the same in violation of the 5th Amendment . . . .

Id. at 24-25. The circumstance of a tax giving rise to a taking was further fleshed out in *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934), which explained that such a situation arises when "the form of taxation was adopted as a mere disguise, *under which there was exercised, in reality, another and different power denied by the Federal Constitution . . . .*" *Id.* at 45 (emphasis added). This rule of law remains vital. *See, e.g., Quarty v. United States*, 170 F.3d 961, 969 (9th Cir. 1999) ("Levying of taxes does not constitute a Fifth Amendment taking unless the taxation is 'so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property . . . .'") (quoting *Brushaber* at 24). It has straightforward application to the instant situation, where Congress taxed exports in violation of the Constitution's single express prohibition on its taxing power. Accordingly, Congress' taxation of exports in this case was an exertion of a power forbidden to it under the Constitution, and, under controlling authority, this unconstitutional exaction gave rise to a confiscatory tax which requires interest to be paid as a component of just compensation.

Whether the taking arose from the retention of the interest or from the outright exaction of the tax, the measure of the plaintiff's recovery is not the actual proceeds of the retained export taxes, but rather the time-value of the money from the taxpayer's perspective: "[C]onsistent and unambiguous holdings [from this Court]" support the conclusion that "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown v. Legal Foundation*

of Washington, 123 S.Ct. 1406, 1419 (2003). At a minimum, the retention by the government of $70 million in actual proceeds must be disgorged under the rule set forth by this Court in *Henkels* v. *Sutherland*, 271 U.S. 298 (1926) — *viz.*, that retention of actual proceeds is not shielded by governmental immunity from interest.

C. Interest on Refunds of the Unconstitutional HMT is Available Under the Export Clause.

This Court has addressed the broad reach of the Export Clause. Specifically, this Court held that the "restriction on the power of Congress . . . should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." *Fairbank v. United States*, 181 U.S. 283, 290 (1901).

The Export Clause's categorical text, "[n]o Tax or Duty shall be laid on articles exported from any State," reflects the framers' purposes to ensure (1) "that exports should not be made a source of revenue to the national government," and (2) "that the national government should put nothing in the way of burden upon such exports." *Fairbank*, 181 U.S. at 292-93. A refund of export tax principal without interest runs contrary to both of these purposes of the Export Clause recognized in *Fairbank*, and thus violates the letter and spirit of the Export Clause.

The Court's unanimous decision in *United States Shoe* that the tax violated the Export Clause was grounded in this Court's underlying determination that the Export Clause is a broad, explicit, direct and complete prohibition of any tax or duty on exports.

To make a taxpayer whole for the unconstitutional deprivation of its money, the Export Clause requires not only a refund of the principal amount of export taxes, but a refund of concomitant interest calculated on the basis of the lost time-value of the money. If interest were denied on refunds of export taxes, Congress could deliberately enact laws that violate the Export Clause and retain the interest that it earned on the illegal exaction, thereby depriving taxpayers of interest on sums that should never have been taxed in the first place. In the present case, if the Court does not grant this petition, the government will have had the free use of unconstitutionally exacted funds for up to sixteen years in some instances. This result would be a clear subversion of the letter and spirit of the Export Clause, as the government will have succeeded in burdening exports and generating revenue therefrom.

D. Interest on Refunds of the Unconstitutional HMT is Available Under the Equitable Doctrine of Restitution.

In any event, the Court should grant the petition to address whether, under the equitable doctrine of restitution, the government should be required to disgorge the interest that it actually earned on the unconstitutional HMT. Under the traditional application of the equitable doctrine of restitution, where property is unlawfully obtained by compulsion or coercion, it must be returned to its rightful owner to prevent un-just enrichment. *See generally Dobb's Law of Remedies*, 628-55 (1993). Traditionally, restitution has included "not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or repa-

ration of benefits derived from, or the loss or injury caused to another." 66 Am. Jur. 2d § 1 *RESTITUTION AND IMPLIED CONTRACTS* (1973) at 942. The measure of what must be returned, in this case, is based on the government's gain, not the taxpayers' losses. Thus, courts have required the person obligated to make restitution "to account for the direct product of the subject matter received while in his possession, and to pay such additional amount as compensation for the use of the subject matter as will be just to both parties . . . even though the transferred property itself has previously been recovered, and an action is brought solely to recover the income or value of the use of the subject matter, or interest upon the amounts of its value." *Id.* § 171 at 1098 citing *RESTATEMENT OF RESTITUTION* § 157 (1937). Moreover, "a person who has a duty to pay the value of a benefit which he has received is also under a duty to pay interest upon such value from the time he committed the breach of duty in failing to make restitution if, and only if, the benefit constituted of a definite sum of money . . . or the payment of interest is required to avoid injustice." *Id.* citing *RESTATEMENT OF RESTITUTION* §§ 156, 157 (1937).

The equitable doctrine of restitution applies in the present situation in spite of the rule in *Shaw*. Two circuits have found the rule in *Shaw* to be inapplicable where the government earned interest, actually or constructively, on unlawfully obtained money. *See, e.g., United States v. $515,060.42*, 152 F.3d 491, 504-05 (6th Cir. 1998) ("While sovereign immunity customarily precludes the Government's liability for interest prior to judgment . . . to the extent that the Government has actually or constructively earned in-

terest on seized funds, it must disgorge those earnings along with the property . . . there is no issue of sovereign immunity because the Government is not being asked to pay interest, but to disgorge property."). *United States v. $133,735.30*, 139 F.3d 729, 732-33 (9th Cir. 1998) (acknowledging that the Government is not generally liable for damages or interest prior to judgment be-cause of sovereign immunity, but noting that the court was "offended by the notion that the Government could profit from [the] use of a claimant's property by (actually or constructively) earning interest on money," and so upheld an award of interest where the "Government benefited from the use of [plain-tiff's] money . . . [W]hen seized currency is deposited in an interest-bearing Treasury account, the Government must only return with the *res* the interest earned by the Fund at the prevailing rate."). *See also United States v. $277,000*, 69 F.3d 1491 (9th Cir. 1995).

The United States Courts of Appeal for the First, Second, Eighth and Tenth Circuits, however, have declined to recognize an equitable exception to the Shaw rule in cases with factual bases similar to those considered by the Sixth and Ninth Circuits. *See, e.g., Larson v. United States*, 274 F.3d 643 (1st Cir. 2001); *United States v. $30,006.25*, 236 F.3d 610, 614-15 (10th Cir. 2000); *United States v. $7,990.00*, 170 F.3d 843, 845-46 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 238-39 (2d Cir. 1998).

IBM's situation here presents the same issue as the one causing the split, even though it is not a forfeiture action. Like the forfeiture cases, the instant action involves a benefit that the United States has actually and calculably received from IBM's unconstitutionally collected money. Both situations involve

unlawful (and, in IBM's case, unconstitutional) confiscations of money by the Government.

Because the circuits' reasoning applies to unlawful confiscations generally, IBM likely would have been entitled to interest in the Sixth and Ninth Circuits, but would not have received interest in the First, Second, Eighth, and Tenth Circuits, even after the enactment of the new forfeiture statute by Congress. *See $30,000.25*, 236 F.3d at 613 (referencing the Civil Asset Forfeiture Reform Act of 2000, codified at 28 U.S.C. § 2465(b)(1)(C)). That statute does not resolve the circuit split as it relates to IBM.

Outside of forfeiture actions, the circuit split will continue whenever the Government unlawfully collects money from private citizens. At a minimum, therefore, the Court should grant the petition for the purpose of resolving this conflict among the circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

William D. Outman, II
(Counsel of Record)
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4078
(202) 452-7010
Counsel for Petitioner
International Business
Machines, Corp.

June 17, 2003